Office Supreme Court, U. S.
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WM. R. STANSBURY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 1 1 [redacted] 341

WILLIAM EARL DODGE ET AL., Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Defendant, Respondent.

PETITION FOR WRIT OF CERTIORARI, NOTICE, AND BRIEF IN SUPPORT OF PETITION.

DANIEL T. HAGAN,
PETER W. McKENNAN,
Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No.

WILLIAM EARL DODGE ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA,
LIBELLANT, RESPONDENT.

NOTICE OF DATE OF FILING.

Please take notice that in the above entitled cause a petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit to review said cause has been filed this — day of April, A. D. 1926, a copy of said petition and of the brief in support thereof are hereto attached, all of which you are respectfully requested to acknowledge service.

DANIEL T. HAGAN,
PETER W. McKIERNAN,
Attorneys for Petitioners.

Receipt of a copy of the above notice and of said petition and brief in support thereof acknowledged this — day of April, A. D. 1926.

UNITED STATES OF AMERICA,
Respondent,

By —— ——.

Receipt of a copy of the record in the above case is hereby acknowledged this — day of April, A. D., 1926.

IN THE

SUPREME COURT OF THE UNITED STATES.

No.

OCTOBER TERM, 1925.

WILLIAM EARL DODGE ET AL., *Petitioners,*

vs.

THE UNITED STATES OF AMERICA, *Libellant, Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable Supreme Court of the United States:

Your petitioners, William Earl Dodge and Joshua T. Dodge, of the Town of New Shoreham, County of Newport and State of Rhode Island, hereby make application to the Supreme Court of the United States for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit, to review the judgment of said First Circuit, dated March 3, 1926, which judgment reversed a decree of the District Court for the District of Rhode Island, and for their petition therefor respectfully show as follows:

Questions Presented.

I. Whether the decree of said court is in conflict with the weight of authority.

II. Whether said decree decides an important question of Federal law which has not been, but should be settled by this Court.

III. Whether this Court shall grant said writ because said decision is in conflict with the decision of another circuit court of appeals on the same matter.

Statement of Case.

On March 5, 1925, the United States filed in the United States District Court for the District of Rhode Island, a libel of information against the motor boat "Ray of Block Island" for forfeiture under Section 26, Title II, of the National Prohibition Act.

The facts shewn at the hearing on July 24, 1925, on the motion of the appellees to dismiss were briefly:

On April 18, 1924, members of the police force of the city of Providence discovered Joshua T. Dodge and others aboard the "Ray" at a dock in said Providence; that said police officers then and there seized said boat and a quantity of intoxicating liquor which she had aboard; that on the same night said police officers removed the liquor from said vessel and took it to the police station, about a mile away, in the said city of Providence; that prohibition officers were notified subsequently and several hours after the seizure, Federal prohibition agents visited the dock where they found one police officer guarding the "Ray." There was, at that time, no liquor aboard the vessel and none of the defendants arrested were at the scene, the defendants and the liquor having been taken from the vessel to the police station.

The boat was thereupon turned over to the Federal prohibition agents and the defendants were held all night at the police station. The following day the defendants were arraigned and some time subsequent thereto paid fines on charges of unlawfully transporting intoxicating liquor in violation of the National Prohibition Act. Thereafter, on March 5, 1925, a libel was filed against the vessel, which libel in paragraph marked "II" states "that said police officers then and there seized said intoxicating liquors and said motor boat," etc. * * *

A claim of the owners and also a lien claim of the mortgagee was subsequently filed and in the claim of the owners there was an allegation that the seizure of said vessel was in violation of law, and in addition thereto, said owners filed a motion to dismiss, setting up:

1. That seizure by police officers is without authority in law.

2. That there was no State authority to seize the boat or to forfeit the same.

3. That forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession.

On the issue of the legality of the seizure raised by the motion to dismiss, hearing was held before Judge Brown in the District Court for the District of Rhode Island.

On July 24, 1925, the case was heard on motion to dismiss and on July 31, 1925, the opinion of the dis-

trict court was filed granting the claimants' motion to dismiss. August 1, 1925, the Government appealed from the decree ordering return of the boat.

WILLIAM EARL DODGE,
JOSHUA T. DODGE,
Petitioners.

DANIEL T. HAGAN,
Counsel.
PETER W. McKIERNAN,
Counsel.

DISTRICT OF RHODE ISLAND,
State of Rhode Island,
County of Providence, ss:

Joshua T. Dodge, being duly sworn, says that he is one of the petitioners in the above entitled proceeding; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

—— ——.

Sworn to before me this 13th day of April, 1926.
DANIEL T. HAGAN,
Notary Public.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No.

WILLIAM EARL DODGE ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA,
LIBELLANT, RESPONDENT.

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The motor boat "Ray" was libelled under section 26, of the National Prohibition Act, after its owner, Joshua T. Dodge, had been convicted of a violation of the National Prohibition Act.

It appeared that said vessel was seized by the police of the city of Providence and certain liquors found thereon were removed from said vessel and a police officer was placed in charge of the boat at a dock in said city of Providence until the following day, when Federal prohibition agents took possession of the boat.

The motor boat "Ray" was a small gasoline craft and the claimant, Joshua T. Dodge, duly filed his claim and asked for the dismissal of the libel on the ground that the National Prohibition Act confines the duty of seizure of vehicles to officers of the United States and that a seizure by police officers under said act is without authority and not recognized by a subsequent surrender of the vessel to Federal officers.

Also that there was no authority under said prohibition law to seize any boat or vehicle found transporting intoxicating liquor and that the forfeiture could be declared only in the event that the thing sought to be forfeited was legally taken into possession.

ARGUMENT.

The argument will be confined to the questions involved as follows:

1. Whether the decree of said court is in conflict with the weight of authority.

2. Whether said decree decides an important question of Federal law which has not been, but should be, settled by this Court.

3. Whether this Court shall grant said writ because said decision is in conflict with the decision of another circuit court of appeals on the same matter.

Point I.

The Decree is in Conflict with the Weight of Authority.

It is apparent from the decisions of the Federal courts that the weight of authority under this point today is that under section 26 of Title II of the National Prohibition Act, Federal officers only are empowered to make seizures of vehicles or vessels found violating the provisions of said section.

U. S. vs. Loomis, 297 Fed., 359 (9 C. C. A.).
U. S. vs. Thomas, 297 Fed., 362 (9 C. C. A.).
U. S. vs. One Reo Motor Truck, 6 Fed., 2d, 412, Dis. Ct., Morton, J.

In the case of U. S. *vs.* Loomis, *supra*, the court held that the general rule is that a statute whereby a man may be deprived of his personal property by way of a punishment, should be construed with strictness; hence, those who assume authority to take possession of such property should have clear warrant for their action.

Section 26 of Title II of the National Prohibition Act (Comp. St. Ann. Supp. 1923, sec. 10138½ mm) does not expressly mention officers of the State or any local subdivision thereof, and that in the absence of including words the construction of the court is that, in using the language set forth in said section, Congress confined the duty of seizure of automobiles to officers of the United States only.

The Ninth Circuit Court in this case sets forth the various provisions of the Volstead Act indicating the

intent of Congress to narrow and confine the question of seizures to officers of the United States only. The court further compares various statutes of the Federal Government containing broader terms in which police officers and other officers of the State are allowed to enforce Federal statutes, and in construing section 26 confines the construction to the general rule of strictness where the common law rights of a citizen have been abrogated.

The court in its final paragraph says that it has considered the decision of the Fifth Circuit in the case of *U. S. vs. Story*, 294 Fed., 517, where it was held that police officers might make these seizures in behalf of the Government and concludes:

> "but necessity of adherence to the rule of strict construction constrains us to hold that the police authorities were not empowered to make the seizure."

This same court decided the case of U. S. vs. Thomas, *supra*, on the same grounds.

Against these decisions already cited is the case of U. S. *vs.* Story, 294 Fed., 517, decided several months prior to the Loomis decision, and in those in conflict with the Loomis decision, the court holds that the provision of Section 26 of Title II of the National Prohibition Act are not exclusive but are cumulative remedies. The court holds further that the regularity of the seizure is not a necessary condition to condemnation if there is sufficient ground for an adjudication of forfeiture.

The Story case is based upon a construction of "The Caledonian," decided by this Court in 4 Wheaton, 101; 4 L. Ed., 523. This case decides that regardless of who seizes, the Government may adopt the seizure, and if it does and a case of forfeiture is shown to exist, condemnation will follow, notwithstanding the seizure was by an unauthorized person.

Upon examination it will be found that the Circuit Court of Appeals for the First Circuit in the present case, decided March 3, 1926, says:

> "We agree with the decision of the court below as to the construction of Section 26 of Title II of the Prohibition Act—that it confers authority only upon United States officers—but are of the opinion that it erred in dismissing the libel, as the United States, in taking over the vessel and filing the libel to enforce a forfeiture, ratified and adopted the acts of the police officers and thereby rendered the seizure lawful under Section 26," etc. • • •

It is conceded that the boat was empty at the time it was seized by the Federal officers.

In concluding this point, your petitioners therefore contend that the decree is in conflict with the weight of Federal decisions regarding Section 26 of Title II of the National Prohibition Act.

Point II.

Whether Said Decree Decides an Important Question of Federal Law Which has Not Been, but Should be, Settled by This Court.

It is apparent from the discussion of Point I that there is a question of Federal Law which should be decided by this Court. An examination of the authorities already cited shows that one line of Circuit Court decisions follows cases based upon "The Caledonian," *supra*, while another line of cases follows the sound reasoning laid down by the court in the case of U. S. *vs.* Loomis, *supra*.

Under the prior rule it will be seen that cases following "The Caledonian" frequently cite the cases of Taylor *vs.* U. S., 3 How., 197; 11 L. Ed., 559; Wood *vs.* U. S., 16 Pet., 342; 10 L. Ed., 987, and Gelston *vs.* Hoyt, 3 Wheaton, 246; 4 L. Ed., 381.

An examination of this case shows the fact that "The Caledonian" was a prize case, a case decided by this Court against a vessel charged with trading with the enemy in the time of war. It involved a violation of the neutrality laws, and it is a well-known fact, as was set forth in this case, that any citizen may seize any property *actually forfeited* to the use of the Government as a prize of war to enforce the forfeiture.

There is indeed a great distinction between enforcing forfeitures in cases where the thing to be forfeited is actually forfeited *ipso facto* because of a treaty or because of the Constitution and a forfeiture arising out of a statute which not only fails to provide for forfeiture *ipso facto*, but contains provisions for a release of property on bond.

In Gelston *vs.* Hoyt, *supra*, this Court stated that at common law any person may, at his peril, seize for a forfeiture to the Government, and if the Government adopt the seizure, and the *property is condemned*, he will be justified. The Court also held in that case that if the party be entitled to any part of the forfeiture, there could be no doubt that he would be entitled in that character to seize.

And, although this case is often cited as an authority contradictory of the theory in the Loomis case, on page 311, this Court said: "But there are express statutable provisions, which directly apply to the present case."

This, of course, clearly designates the ground upon which this case was decided, and the case, therefore, is not an authority for the rule *contra* to the law as laid down in U. S. *vs.* Loomis, *supra*.

In the case of Taylor *vs.* U. S., *supra*, the seizure was made by a customs officer, and the statement of the Court regarding common law seizures was pure dictum. On page 203 of the opinion it appears that the judge, in his charge in the lower court, instructed the jury, under Charge No. 7,

> "That under the Act of 1830, when a package or invoice has been made up with intention to defraud, the package or invoice (that is, the goods contained in the invoice) are forfeited."

There was no question in this case but what the officer who made the seizure was authorized by statute and the goods seized were forfeited *ipso facto*.

It is clear, therefore, that under the second point, since the passage of the National Prohibition Act,

there is a question of Federal Law which has not been decided, but which should be settled by this Court.

POINT III.

Whether This Court Shall Grant Said Writ Because Said Decision is in Conflict with the Decision of Another Circuit Court of Appeals on the Same Matter.

It is apparent from the foregoing that the Circuit Court of the Fifth Circuit, in the case of U. S. *vs.* Story, 294 Fed., 517, has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, namely, the construction of Section 26 of Title II of the National Prohibition Act.

The conflicting opinion is set forth in the case of U. S. *vs.* Loomis, 297 Fed., 359. The opinion of the Circuit Court in the case at bar upholds the Ninth Circuit on the question of the construction of the statute, yet adheres to the Story decision on the theory of seizure by adoption.

Conclusion.

The petitioners therefore pray that their writ of certiorari be granted for the causes herein set forth, and principally because Rule 35, Section 5 (B) of this Court, indicated the reasonableness of the request for a review.

Respectfully submitted,

DANIEL T. HAGAN,
PETER W. McKIERNAN,
Counsel for Petitioners.

Supreme Court, U.S.
FILED
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No. [redacted] 341

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1978

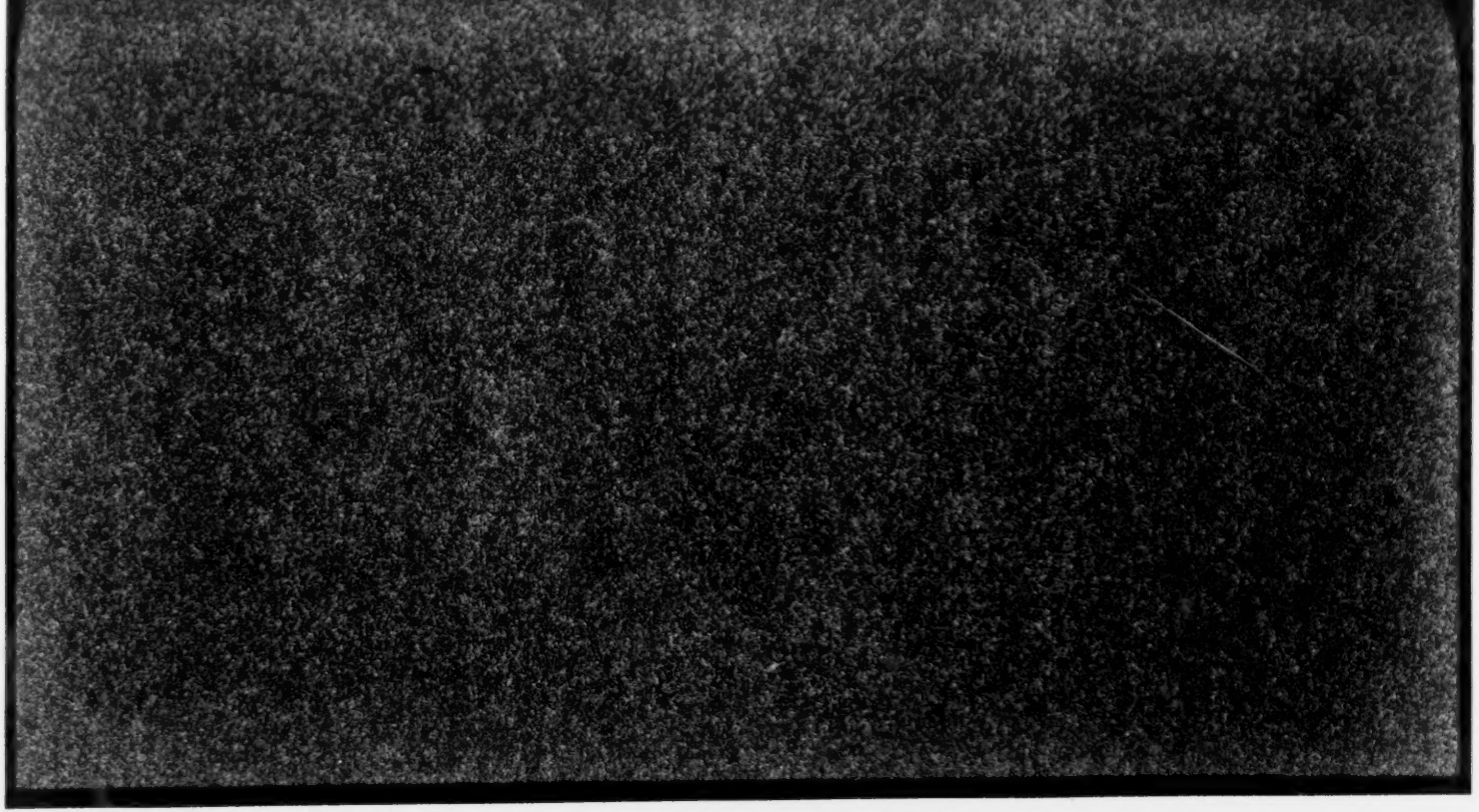
WILLIAM RAY DAVIS, JR., PETITIONER

v.

THE DAVEY SCREEN OF ARKANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

MEMORANDUM IN SUPPORT OF THE UNITED STATES



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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 1132

WILLIAM EARL DODGE ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM ON BEHALF OF THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the First Circuit has not yet been officially reported, but is found in the record at page 23. The opinion of the District Court for the District of Massachusetts is reported in 7 F. (2d) 189, and is printed in the record at page 10.

JURISDICTION

The final judgment or decree whose review is sought was entered by the Circuit Court of Appeals on March 3, 1926 (R. 26), and on March 29 the Circuit Court of Appeals ordered a stay of its mandate on condition that the petitioners in this Court file their petition for writ of certorari within twenty days (R. 27).

The petitioners are applying to this Court for a writ of certiorari pursuant to the authority granted by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 936.

STATEMENT

The facts in this case are undisputed. On April 18, 1924, certain police officers of the City of Providence, Rhode Island, discovered one Joshua T. Dodge in the act of illegally transporting liquors in the motor boat *Ray of Block Island* on the Providence River and within the District of Rhode Island. Dodge, who was one of the owners of the vessel, was arrested, the boat and its cargo of intoxicating liquor were seized, and thereafter the prisoner and the seized property were turned over by the Providence police officers to the officers of the Federal Government. The motor boat, after being unladen by the municipal police, was delivered into the custody of Harry G. Sheldon, Federal Prohibition Director for the District of Rhode Island, and a criminal information was filed in the Federal court charging Joshua T. Dodge with the illegal transportation of intoxicating liquor in said vessel, contrary to the provisions of the National Prohibition Act.

On December 10, 1924, Joshua T. Dodge was convicted of illegally transporting intoxicating liquor on the information heretofore mentioned, and on March 5, 1925, the United States Attorney for the District of Rhode Island filed a libel against the

motor boat *Ray of Block Island*, claiming its forfeiture to the United States under the provisions of Section 26, Title II, of the National Prohibition Act. (R. 3–4.)

On April 7, 1925, William Earl Dodge and Joshua T. Dodge intervened in the aforesaid libel proceedings as claimants, alleging that they were the owners of said motor boat (R. 7), and on the same day these claimants filed an answer (R. 9), admitting all the averments of fact which were contained in the libel, but denying that they constituted cause for forfeiture.

Acting upon a motion to dismiss (R. 8), which was filed by the claimants at the same time they filed their answer, the District Court, on August 1, 1925, ordered the libel to be dismissed and further decreed that the United States Marshal should deliver the motor boat *Ray of Block Island* into the possession of said claimants (R. 16).

On August 20, 1925, the United States entered its appeal from the adverse decree of the District Court (R. 17), and on March 3, 1926, the United States Circuit Court of Appeals for the First Circuit reversed the decree of the court below and ordered the case remanded for further proceedings (R. 26). On March 29, 1926, upon motion of counsel for the claimants, the Circuit Court of Appeals stayed its mandate (R. 27), and on April 16, 1926, the said claimants filed a petition in this Court praying that a writ of certiorari be directed to the Circuit Court of Appeals to bring up the record.

QUESTION PRESENTED

The sole question at issue in this case is, whether or not a vessel or vehicle used in illegally transporting intoxicating liquor and seized by officers of the law who are not Federal officers, may be forfeited to the United States under the provisions of Section 26, Title II, of the National Prohibition Act.

STATUTE INVOLVED

Section 26, Title II, of the National Prohibition Act (Chap. 85, 41 Stat. 305, 315) provides in part:

> When the commissioner, his assistant, inspectors, or *any officer of the law* shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to

return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, * * *. (Italics ours.)

DISCUSSION

The views of various Circuit Courts of Appeals which have passed upon this question are not uniform.

The case first raising the question in any Circuit Court of Appeals was *United States* v. *Story,* 294 Fed. 517, decided in the Fifth Circuit on November 30, 1923. In the *Story case* the court decided that the words " any officer of the law," in Section 26 of Title II of the National Prohibition Act were broad enough to include and did include state officers as well as Federal officers, and that a vehicle seized by state officers in the act of transporting intoxicating liquors and subsequently surrendered to Federal officers could be forfeited under Section 26.

The next case on the subject was *United States* v. *Loomis,* 297 Fed. 359, decided by the Circuit Court of Appeals for the Ninth Circuit on March 28, 1924. In this case the Circuit Court of Appeals specifically disapproved of the law announced in the *Story case,* and reached an opposite conclusion. It was held in the *Loomis case* that

Section 26 of Title II of the National Prohibition Act did not authorize any officers except Federal officers to seize a vehicle transporting intoxicating liquor contrary to the provisions of the National Prohibition Act. The Ninth Circuit Court of Appeals held that such a seizure of a vehicle by a state officer was illegal and that the property seized could not be forfeited to the United States because it was not lawfully taken into possession. The court specifically disapproved the application of the principle of adoption which was mentioned by way of dictum by the United States Circuit Court of Appeals for the Fifth Circuit in the *Story case*.

We now have a third variation of interpretation in the opinion of the Circuit Court of Appeals for the First Circuit in the instant case. This Circuit Court of Appeals does not agree with either one of the other appellate courts which have passed upon the question. In the case at bar the Circuit Court of Appeals holds with the Ninth Circuit and contrary to the Fifth Circuit that Section 26 of Title II of the National Prohibition Act does not authorize state officers to seize vehicles found transporting intoxicating liquors, but it approves the principle that Federal officers may lawfully adopt a seizure made by state officers and that such an adopted seizure may be made the basis of forfeiture proceedings. On the question of adoption the court disagrees with the conclusions of the Ninth Circuit in the *Loomis case*, and approves the

dictum on that subject announced by the Fifth Circuit in the *Story case*.

CONCLUSION

In view of the conflict of decisions in three Circuit Courts of Appeals, it is believed that under Rule 35, paragraph 5, of this Court the instant case may be of such a nature that the sound judicial discretion of this Court may properly be exercised by directing the issuance of a writ of certiorari. Therefore, the Government does not oppose the granting of the writ.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

APRIL, 1926.

Office Supreme Court, U. S.
FILED
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WM. R. STANSBURY
CLERK

No. 341

In the Supreme Court of the United States

OCTOBER TERM, 1926

WILLIAM EARL DODGE ET AL., PETITIONERS

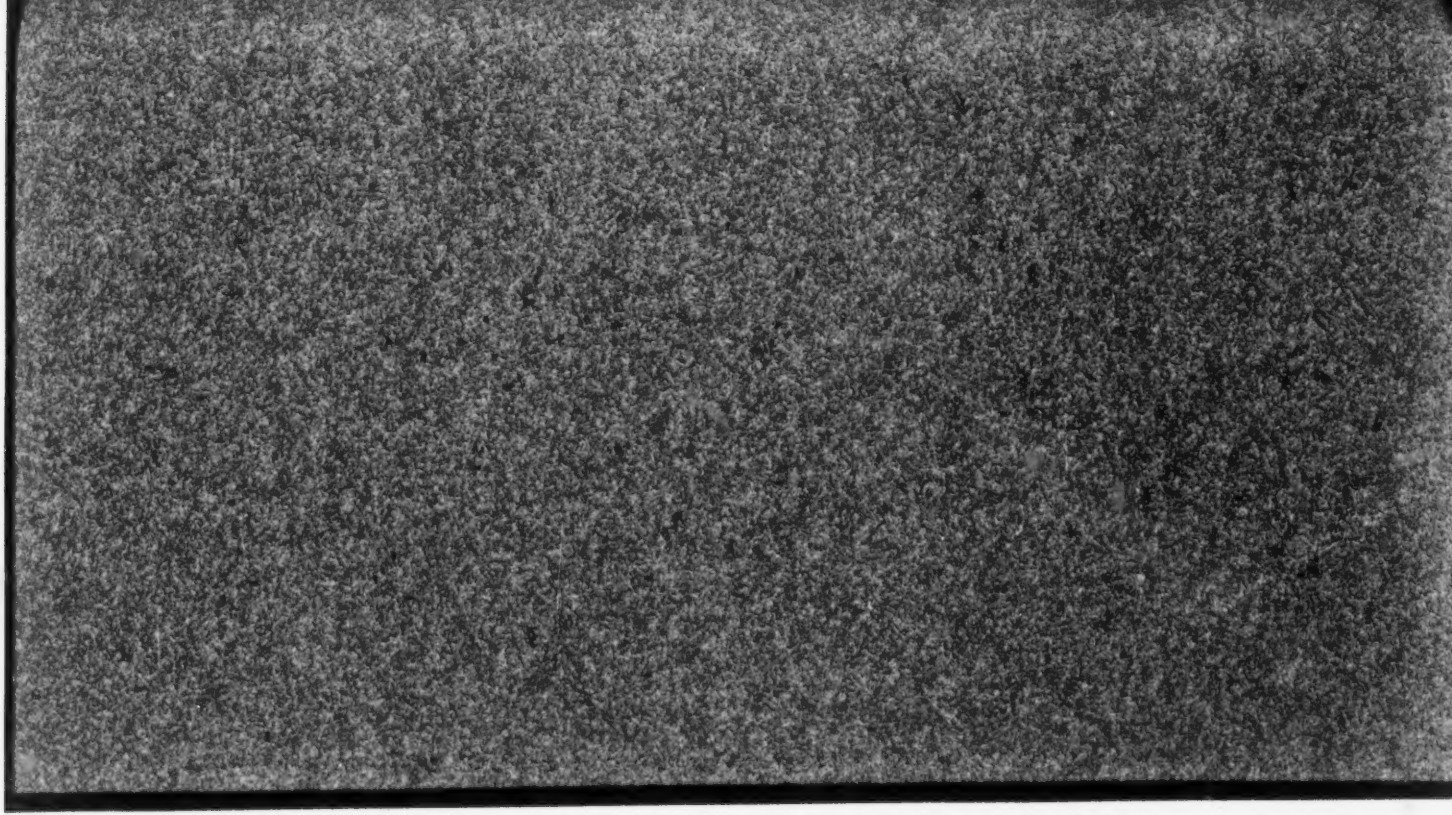
v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1926



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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 341

WILLIAM EARL DODGE ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court is reported in 7 F. (2d) 189, and that of the Circuit Court of Appeals is reported in 11 F. (2d) 522. These opinions will also respectively be found at pages 10–16 and 23–25 of the record.

JURISDICTION

On May 18, 1926, this Court granted a petition for a writ of certiorari in this case pursuant to the authority conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938). On June 1, 1926,

the case was placed on the summary docket for argument on October 25, 1926.

QUESTION PRESENTED

The question in this case is whether a vessel seized in the act of transporting intoxicating liquor in violation of the National Prohibition Act by police officers of a State who are not Federal officers may be forfeited to the United States under Section 26, Title II, of that act.

On account of conflict between Circuit Courts of Appeals the United States did not oppose the issuance of a writ of certiorari.

STATEMENT OF THE CASE

The United States filed its libel in the District Court of the United States for the District of Rhode Island, under Section 26, Title II, of the National Prohibition Act, to forfeit the motor boat *Ray of Block Island*, her engines, tackle, apparel, and furniture. The libel alleged that said motor boat was discovered by police officers of the city of Providence, Rhode Island, while in the act of transporting intoxicating liquor, in violation of Sections 3 and 26 of Title II, on the Providence River, a navigable water of the United States within the limits of said city; that the said officers thereupon seized the liquor and motor boat and also took into custody one Joshua Trueman Dodge, who was in charge of the boat; that Dodge was later arrested by officers of the United States and was thereafter

convicted in the Federal court of transporting the liquor in violation of Section 3 and sentenced to pay a fine of $500, which he paid, and that the motor boat was turned over to the Federal Prohibition Director, by whom it was held within the jurisdiction of the court. (R. 2–4.)

Petitioners here appeared as claimants of the boat and filed an answer in which they admitted the above averments of the libel, but denied that such averments showed a sufficient basis for forfeiture. (R. 7–8, 9.) They also filed a motion to dismiss the libel upon the following grounds (R. 8–9):

> 1. That the National Prohibition Act confines the duty of seizures of vehicles to officers of the United States and that a seizure by police officers under said act is without authority and is not recognized by a subsequent surrender of the vehicle to federal officers.
>
> 2. That there is no authority under the State Prohibition Law to seize any boat or vehicle found transporting intoxicating liquor.
>
> 3. That forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession.

Following a hearing upon the foregoing motion, the District Court rendered an opinion in which it held, in substance, that unless the police officers who made the seizure in this case came within the term "any officer of the law," as used in Section 26, Title II, of the National Prohibition Act, the seizure by

them of the motor boat in question was without authority of Federal law; that while in the case of *United States* v. *Story*, 294 Fed. 517, the Circuit Court of Appeals for the Fifth Circuit had construed the above phrase of Section 26 as broad enough to embrace state as well as Federal officers, the court was impressed with the correctness of the contrary conclusion reached in *United States* v. *Loomis*, 297 Fed. 359, wherein the Circuit Court of Appeals for the Ninth Circuit referred to, but declined to follow, the *Story case* decision and affirmed a decree which denied the right of the United States to forfeit an automobile because seized by state officers; that, in view of the concession in argument in this case that there was no law of the State of Rhode Island authorizing such a seizure, it was evident that the seizure by the police officers was unauthorized either by state or Federal law, and that, therefore, the Government's libel for forfeiture would not lie. (R. 10–16.) The motion to dismiss was accordingly sustained and a final decree entered ordering delivery of the boat to the claimants. (R. 16.)

Upon appeal by the Government, the Circuit Court of Appeals agreed with the District Court that the phrase of Section 26, "any officer of the law," was confined in its application to Federal officers of the law. The appellate court held, however, that the District Court had erred in dismissing the Government's libel because the adoption by the Government of the act of the police officers in

seizing the motor boat at a time when it was engaged in transporting intoxicating liquor in violation of the National Prohibition Act, had the effect of rendering the seizure legal. (R. 23–26.) The decree of the District Court was therefore reversed and the cause ordered remanded for futher proceedings (R. 26), whereupon a writ of certiorari was issued by this Court.

STATUTES INVOLVED

Section 26, Title II, of the National Prohibition Act (c. 85, 41 Stat. 305, 315), provides, so far as pertinent in this case, that—

> When the commissioner, his assistant, inspectors, or *any officer of the law* shall discover any person in the act of transporting in violation of the law intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the

value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. * * *

Section 1014 of the Revised Statutes reads:

For any crime or offense against the United States the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the

usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

SUMMARY OF ARGUMENT

The phrase "any officer of the law," contained in Section 26, Title II, of the National Prohibition Act, is the only provision of Federal law which by any reasonable construction could be held to authorize state officers to seize a vehicle found transporting intoxicating liquor in violation of that Act.

The Fifth Circuit Court of Appeals has held that Section 26 authorizes state officers to make seizures. The Ninth Circuit has held that it does not, and that the Government may not condemn property seized by state officers. The Circuit Court of Appeals for the First Circuit, in the instant case, finds no warrant in Section 26 of the National Prohibi-

tion Act or other Federal laws for state officers to seize vehicles for forfeiture, but holds that the United States may adopt, and in the instant case has adopted, the seizure by state officers, and that forfeiture under Section 26 of the National Prohibition Act may lawfully rest thereon. The latter seems to us the sounder reasoning.

Even if the adoption by the United States of the seizure did not have the effect of validating it from the beginning, nevertheless the jurisdiction of the District Court to adjudge a forfeiture of the motor boat was in no way impaired by the fact that the seizure of the boat was unauthorized.

The requirements of Section 26, the failure to comply with which on the part of the Government, petitioners assert, deprived the District Court of jurisdiction to adjudge a forfeiture of the motor boat, are mere directory provisions which impose duties upon the seizing officers, but have no bearing upon the jurisdiction of the court of a libel for forfeiture under that section.

ARGUMENT

I

The conflicting decisions of the Fifth, First, and Ninth Circuit Courts of Appeals concerning forfeitures under Section 26 of the National Prohibition Act

The Circuit Court of Appeals for the Fifth Circuit has held that state officers come within the authority conferred by Section 26. The Circuit Court of Appeals for the Ninth Circuit has held

that they do not, and that accordingly no condemnation of property may be based upon seizure by state officers. The Government is inclined to believe that the decision of the Circuit Court of Appeals for the First Circuit in this case is supported by the better reasoning. In view, however, of the conflict of decisions between the Circuit Courts of Appeals for the First, Fifth, and Ninth Circuits upon the question of the sufficiency of libels based upon seizures by state officers under Section 26, it is deemed proper to present the three views to this Court for its consideration and decision as to the correct rule of law to apply to forfeiture proceedings under Section 26. As of possible aid to the Court in reaching a conclusion, there is submitted herewith a statement of the conflicting decisions, together with some discussion of each and the reasons which the Government regards as indicating that the question was rightly decided below.

It is conceded in the record in the instant case that the seizure was not authorized by the state law. Whether it was authorized by Federal law is dependent, under the facts, upon whether it was sanctioned by Section 26, Title II, of the National Prohibition Act, and the language of that section which by reasonable intendment might be held to confer authority upon state officers to seize vehicles under that section is the phrase "any officer of the law." The District Court construed that phrase as embracing only Federal officers, and accordingly held that the seizure was not authorized by Section

26. Relying upon the *Loomis* decision, the District Court went further and sustained the motion to dismiss on the ground that the legality of the seizure was essential to sustain a condemnation of the property. The Circuit Court of Appeals agreed with the District Court that Section 26 imposes no duty upon officers other than those of the United States, but held that the action of the United States in taking over the seized property ratified the original seizure by state officers and made it lawful.

In the *Story case* (294 Fed. 517), decided November, 1923, by the Circuit Court of Appeals for the Fifth Circuit, the claimant was convicted of transporting liquors in an automobile, but no order condemning the car was made by the court in the criminal case. Later, forfeiture proceedings were filed and resisted by Story upon the grounds that the seizure of the car could not be lawfully made by state officers and that the subsequent surrender of the car to the United States Marshal did not authorize its condemnation by the Government. The District Court sustained these objections and dismissed the libel. That action was overruled by the Circuit Court of Appeals in an opinion stating that it was evident from the language of Section 26 of the National Prohibition Act "that Congress did not provide for the enforcement in Section 26 by Government officers and Federal courts exclusively." Further support for the view that Congress intended to allow state officers to make seizures was stated as follows (p. 519):

> The Eighteenth Amendment vests concurrent enforcement powers in the states, through either their legislative bodies or public officers. *National Prohibition cases*, 253 U. S. 350. Section 2 of Title II adopts Section 1014 of the Revised Statutes as part of the procedure applicable to the enforcement of the act. Section 1014 provides for the arrest of offenders against the laws of the United States by state magistrates, * * *. It seems clear that Congress contemplated the enforcement of the amendment and of enforcement legislation through state officers as well as through federal officers.

In another paragraph of the opinion, reversal of the District Court's dismissal of the libel was based upon the further reason that—

> The regularity of the seizure is not a necessary condition to a condemnation of the thing seized, providing there is sufficient ground for an adjudication of a forfeiture. Property may be seized by a private person, acting at his peril, and if a cause or forfeiture is shown to exist against it, condemnation will follow, notwithstanding the seizure was by an unauthorized person. *The Caledonian*, 4 Wheat. 101; *Wood* v. *United States*, 16 Pet. 342; *Taylor* v. *United States*, 3 How. 197.

The Ninth Circuit Court of Appeals rendered a contrary decision in March, 1924, in *United States* v. *Loomis*, 297 Fed. 359. In that case it appeared that Loomis had pleaded guilty to transporting

intoxicating liquor in an automobile. No disposition of the car was made in the criminal proceedings. Some weeks after the police officers of Seattle had made the seizure the car was turned over to Federal authorities, who petitioned in the Federal District Court for an order of forfeiture and sale. The petition was dismissed by the District Court. That action was upheld by the Circuit Court of Appeals, which said:

> The general rule is that a statute whereby a man may be deprived of his personal property by way of punishment should be construed with strictness; hence, those who assume authority to take possession of such property should have clear warrant for their action. Section 26 of Title II does not expressly mention officers of the state or any local subdivision thereof, and in the absence of including words our construction is that * * * Congress confined the duty of seizure of the automobile to officers of the United States.

From that premise the court reasoned that in a libel to forfeit the car "the lawfulness of the seizure will be inquired into," and further announced that "Forfeiture can only be declared if the thing sought to be forfeited was lawfully taken into possession." In this connection the Circuit Court of Appeals, after examining the opinions of this Court in *The Caledonian* and *Gelston* v. *Hoyt,* wherein Justice Story stated the common-law rule to be that any person might at his peril seize for forfeiture

to the Government, held them inapplicable to condemnation proceedings under Section 26. The court further mentioned but declined to follow the reasoning in the *Story* case.

It is here interesting to note that, although in 1924 the Circuit Court of Appeals for the Ninth Circuit in the *Loomis* decision spoke thus generally on the subject of forfeitures and repudiated the ancient doctrine of adoption, whereby a seizure, whether legal or not, when taken over by the United States becomes a proper foundation upon which an order of forfeiture and sale may be rested, they later narrowed their views in an opinion delivered in March, 1925, in the case of *United States* v. *One Studebaker Seven-Passenger Sedan*, 4 F. (2d) 534. This was a case where the facts were almost identical with those in the *Loomis* case, but the proceeding to condemn the car was brought under Section 3450 of the Revised Statutes. The libel, which disclosed that the seizure was made by police officers of the city of Spokane, was dismissed by the district judge on the authority of *United States* v. *Loomis*. On appeal, the Circuit Court of Appeals for the Ninth Circuit, considering their prior *Loomis* decision, said:

> It must be conceded that the discussion in the opinion extended to forfeitures generally, but that part of the discussion was mere *dicta*, and *upon further consideration* we are convinced that seizure by a United States revenue officer is not a necessary prerequisite to a forfeiture under Section 3450.

As authority for their somewhat changed attitude they set out an extended quotation from the case of *Taylor* v. *United States*, 3 How. 197, which announces the doctrine that—

> It is wholly immaterial in such a case who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, *provided the adjudication is for a sufficient cause*.

Despite the *Loomis* case, the Circuit Court of Appeals for the Ninth Circuit concluded its opinion in the *Studebaker* case by stating—

> The fact, therefore, that the original seizure was made by police officers constituted no defense to the proceeding.

The Circuit Court of Appeals for the Fifth Circuit held that state officers may, under the authority of Section 26, seize automobiles transporting liquor contrary to the Federal law because it was the intent of Congress to give them such right. The views expressed in the *Story* case arise because Congress when dealing with the most difficult phase of prohibition enforcement—to wit, transportation of liquor by fast-moving vehicles—is presumed to have used every possible agency to apprehend such illegal transportation. Manifestly there are but few Federal agents in comparison to the hundreds of state, city, and county officers who may be in a position to "discover" in the words of the Act itself "any person in the act of transporting" intoxicating

liquors. It is not unusual for Congress to provide in Federal legislation for the use of state facilities to carry out the terms of a Federal law. (See Revised Statutes, Section 1014, and Section 2 of Title II of the National Prohibition Act, under which officers may issue warrants of arrest and search warrants.) And for a discussion of the principles involved in the use of state agencies to carry out Federal law, see *Gentis* v. *Judge of Third District Court*, 246 Mass. 1.

Judge Grubb's conclusion in the *Story* opinion that Congress intended by the term "or any officer of the law" in Section 26 to extend the authority of seizure under that section to state officers, is further supported by the fact that when the Volstead Act was before the House for discussion it was referred to as authorizing "the sheriff or other officer" to seize any conveyance in which liquor is transported. (See Cong. Rec. 66th Cong., Vol. 58, Part 3, p. 2904.)

The *Story* opinion upheld the libel because authority was given to state officers to seize vehicles under Section 26, but the decision does not rest upon that conclusion, as ample support for it is found in authorities cited by the court which uphold the theory that it is not material who seizes a forfeitable article later libeled by the Government. The conflict presented to this Court is, therefore, not whether by fair intendment Section 26 of the National Prohibition Act permits or sanc-

tions seizure of cars by state officers as well as Federal, but whether even if no such authority for state officers to act can be found within the terms of that section, a seizure made by such officers must so taint with illegality the proceedings later taken by the Government that forfeiture will fail. Notwithstanding that there is some support for the view adopted in the *Story case*, that state officers are specifically authorized to seize cars under Section 26, the Government is of the opinion that the sounder reasoning is to be found in the instant case. It is difficult in reading Section 26, with the mandatory expressions used therein and the specific instructions applicable to "officers" concerning release of the car and approval of bond given therefor, to believe that, when using such language, Congress could have intended to speak to state officers as well as Federal. It is not necessary, as is assumed by the Circuit Court of Appeals for the Ninth Circuit in the *Loomis case*, to decide the question whether under the National Prohibition Act the local officer was *under a duty* to take possession of the automobile and arrest the person in charge. It is only necessary to examine the statute to see whether Congress conferred authority upon state officers to do so. The expressions "shall" and "must" are used throughout Section 26. It seems that such mandatory language would be chosen to direct officers immediately under the control of the Federal Government rather than to confer a privilege or grant an authority to state officers. While

weighing the reasoning advanced in support of the construction given in the *Story case*, there arises in one's mind a comparison of the wording Congress has thus chosen for Section 26 with that which was used in Section 13 of the Act of September 13, 1888 (c. 1015, 25 Stat. 479):

> All peace officers of the several States and Territories * * * are hereby invested with the same authority in reference to carrying out the provisions of this Act as a marshal or deputy marshal of the United States, * * *.

In the Act of 1888 there can be no mistake about the clear intent of Congress to enlist the services of state officers in so far as a grant of authority to them to act under Federal sanction can enlist their aid. No such clear statement is to be found in Section 26.

When petitioners applied for a writ of certiorari in this case the Government made no opposition to the granting of the writ because of the ground set up, to wit, a conflict of decision between various circuit courts of appeals. The real conflict is between the Circuit Court of Appeals for the Ninth Circuit in the *Loomis case* and that of the First Circuit in the instant case, and the real difference is in the conclusions drawn by these two circuit courts from the same premise, to wit, that Section 26 gives no specific authority to state officers to seize automobiles transporting liquor in violation of Federal law. In the instant case the First Circuit Court

concludes that without such authority the Federal Government may freely adopt seizures made by state officers and base forfeiture proceedings thereon. The Ninth Circuit Court in the *Loomis case* concludes that since Section 26 gives no authority to state officers seizures made by them can not be used by the Federal Government. The Ninth Circuit Court is in error in drawing this conclusion as a necessary effect of seizure by state officers.

The Ninth Circuit Court is further in error in assuming that in a forfeiture proceeding by the Government the person who makes the seizure is an issue. In the *Studebaker Sedan case*, decided in the Ninth Circuit a year later, the true rule is stated that the fact that police officers made the original seizure constituted no defense to the proceeding. This rule should not be limited as was done in the *Studebaker* decision to libels under Section 3450. It applies likewise to forfeiture proceedings under Section 26 of the National Prohibition Act.

II

An unauthorized seizure for forfeiture becomes valid when adopted by the Government and forfeiture is adjudged

It is settled that where property declared by Federal statute to be forfeited because used in violation of Federal law is seized for forfeiture by one having no authority to do so, the seizor is exonerated from liability to the claimant of the property

if the seizure is adopted by the United States and the property is thereafter condemned as forfeited to the United States.

Gelston v. *Hoyt*, 3 Wheat. 246, 310–311.
The Caledonian, 4 Wheat. 99, 101.
Taylor v. *United States*, 3 How. 197, 205.
United States v. *One Studebaker Seven-Passenger Sedan* (C. C. A., 9th), 4 F. (2d) 534, 535.
The G-883 (R. I.), 6 F. (2d) 416.

In *Gelston* v. *Hoyt*, here cited, an action was brought in a court of the State of New York to recover damages from certain customs officers for the alleged illegal seizure by them of the plaintiff's vessel in New York harbor. The defendants sought by plea to justify their seizure on the ground that, acting under color of their respective offices as Collector of Customs and Surveyor of the port of New York, they had seized the vessel as forfeited under an act of Congress because it was being fitted out for service by one foreign nation in belligerent operations against another with which the United States was at peace. The trial court sustained a demurrer to the plea and judgment went for the plaintiff. Upon the affirmance of the judgment by the state court of last resort, the defendants sued out a writ of error from this Court, assigning, among other claimed errors, that the state courts had erroneously sustained the demurrer to their plea. In deciding the case, this Court, in an opinion handed down by Mr. Justice Story, declared that in

order to establish the admissibility of the plea it was incumbent upon the defendants to sustain the affirmative of four propositions, the last of which was that they had the right to make the seizure. Regarding that proposition, the Court said (pp. 310–311):

> Upon the last point, there does not seem to be much room for doubt. At common law, any person may, at his peril, seize for a forfeiture to the government; and if the government adopt the seizure, and the property is condemned, he will be completely justified; and it is not necessary, to sustain the seizure or justify the condemnation, that the party seizing shall be entitled to any part of the forfeiture. (Hale on the Customs, Harg. Tracts, 227; *Roe* v. *Roe*, Hardr. 185; *Malden* v. *Bartlett*, Parker 105; though *Horne* v. *Booscy*, 2 Str. 952, seems contra.)

In the case of *The Caledonian, supra*, the United States obtained a decree of forfeiture against an American vessel which had been seized at Newport, Rhode Island, by the Collector of Customs at that port for having on board and using a British license, for trading with the enemy, etc. Upon appeal by the claimant, this Court declared that the case involved but two questions: Whether the ship was liable to seizure for the asserted forfeiture after her arrival in port, and, if so, whether the collector had authority to make the seizure. Holding that, by virtue of her British license, the vessel was to be regarded as an enemy ship and that

she had not become immune from seizure for forfeiture merely because she had succeeded in making an American port before being seized, this Court disposed of the second question by saying (p. 101):

> In respect to the other point, it is a general rule that any person may seize any property forfeited to the use of the government, either by the municipal law, or by the law of prize, for the purpose of enforcing the forfeiture. And it depends upon the government itself, whether it will act upon the seizure. If it adopts the acts of the party, and proceeds to enforce the forfeiture by legal process, this is a sufficient recognition and confirmation of the seizure, and is of equal validity in law, with an original authority given to the party to make the seizure. The confirmation acts retroactively, and is equivalent to a command.

In *Taylor* v. *United States*, also above cited, the property libeled by the United States had been seized by the Collector of Customs of the port of Philadelphia as forfeited because having been fraudulently entered at the port of New York. From a judgment for the United States, the claimants brought the case upon writ of error to this Court, where they asserted that the seizure was illegal because the Collector at the port of New York alone had authority to seize under the circumstances. Overruling the contention, this Court held that under the Act of 1799 a collector of customs unquestionably had authority to seize goods found

within his own district, and furthermore declared (p. 205):

> But the objection itself has no just foundation in law. At the common law any person may, at his peril, seize for a forfeiture to the government, and, if the government adopts his seizure, and institutes proceedings to enforce the forfeiture, and the property is condemned, he will be completely justified.

Petitioners seek to brush aside the foregoing rulings of this Court by asserting that the seizures in those cases were sanctioned by the law of prize, or were specifically authorized by statute, and that what this Court said regarding the validating of seizures made without authority of law was unnecessary to the decisions and therefore *obiter dictum*. But the general principle of law referred to by this Court was plainly regarded by it as applicable to all seizures for forfeiture and was given as an additional reason for holding that the seizures in those cases were legally justified. The observations quoted were, therefore, in no proper sense *obiter dicta*, for, as recently stated by this Court in *United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, 486, "Where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.' *Union Pacific R. R. Co.* v. *Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160, 166; *Railroad Companies* v. *Schutte*, 103 U. S. 118, 143."

III

Jurisdiction to adjudge a forfeiture of seized property is in no way dependent upon the legality of the seizure

In the *Loomis case,* heretofore cited, the Circuit Court of Appeals for the Ninth Circuit held that, as the seizure in that case was not authorized by Section 26, the decree of the District Court, denying a petition of the United States to forfeit the seized property, must be affirmed because "Forfeiture can only be declared if the thing sought to be forfeited was legally taken into possession." The latter holding was unsupported by any citation of authority or other discussion. In the instant case, the District Court, adopting the reasoning of the *Loomis case* decision to that extent, held that the seizure by the police officers was unlawful. It thereupon dismissed the libel without any reference to the question of whether an unlawful seizure precluded the right to forfeit the seized property. Upon appeal, the Circuit Court of Appeals also held that the seizure, as originally made, was unlawful, but ruled that the adoption of the seizure by the United States related back and made it lawful from the beginning. For the reasons stated in Points I and II of this brief, the Government believes that the decision of the Circuit Court of Appeals was correct upon both points. It furthermore respectfully submits, however, that the question of the legality or illegality of a seizure in no way affects the juris-

diction of a court to adjudge a forfeiture of property which the Government had in possession when the forfeiture proceedings were brought.

The point has been several times passed upon by this Court. In *Wood* v. *United States*, 16 Pet. 341, the Court answered the complaint, that the libeled goods had been seized upon a ground other than that for which their forfeiture had been decreed, by saying (p. 358):

> It is of no consequence whatsoever, what were the original grounds of the seizure, whether they were well-founded or not, if, in point of fact, the goods are by law subjected to forfeiture; for the United States are not bound down, by the acts of the seizors, to the causes which influenced them in making the seizure, nor by any irregularity on their part in conducting it, if, in point of fact, the seizure can now be maintained, as founded upon an actual forfeiture thereof, at the time of the seizure, and therefore, it was rightly held by the judge, that no question arose upon the issues which the jury were to try, except upon the causes of forfeiture alleged in the information. The remarks just made constitute an answer to the argument upon the demurrers to the two first pleas of the claimant; for, as has been already suggested, if a seizure has been actually made, and is a continuing seizure, it is no bar to proceedings thereon, that the cause of forfeiture relied on is not the same upon which the seizure was originally made. It is sufficient for the United States, that it adopts the seizure and

> now proceeds for a good cause of forfeiture, although utterly unknown to the original seizors.

In *Taylor* v. *United States*, 3 How. 197, this Court, after declaring, as hereinbefore shown, that the adoption by the Government of a seizure for forfeiture and a subsequent condemnation completely justified the seizure, though originally unauthorized, furthermore stated (p. 205):

> It is wholly immaterial in such a case who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause. This doctrine was fully recognized in this court in *Hoyt* v. *Gelston*, 3 Wheat., 247, 310, and in *Wood* v. *United States*, 16 Pet. 342, 358, 359. And from these decisions we feel not the slightest inclination to depart.

In *The Ship Richmond*, 9 Cranch, 102, an American vessel seized by a United States gunboat in Spanish waters off the coast of Florida was libeled for forfeiture for violation of the Nonintercourse Act. It was urged that the libel would not lie because the seizure within the waters of a foreign nation was illegal. Chief Justice Marshall, speaking for this Court, replied, however (p. 103):

> The seizure of an American vessel, within the territorial jurisdiction of a foreign power, is certainly an offense against that power, which must be adjudged between the

> two governments. This court can take no cognisance of it; and the majority of the court is of opinion that the law does not connect that trespass, if it be one, with the subsequent seizure by the civil authority, under the process of the district court, so as to annul the proceedings of that court against the vessel.

In *The Merino*, 9 Wheat. 390, the right of the United States to libel certain American vessels seized in Spanish waters for transporting slaves in violation of a law of the United States was similarly challenged on the ground that the seizure was illegal, but this Court said (p. 401):

> The illegality of the service in this latter case has nothing to do with the question of jurisdiction, as was decided by this Court in the case of *The Richmond*. (9 Cranch, 102.)

Similar decisions were rendered in *United States* v. *Story* (C. C. A., 5th), 294 Fed. 517, 519; *The Sagatind* (S. D., N. Y.), 4 F. (2d) 928, 931; *United States* v. *One Studebaker Seven-Passenger Sedan* (C. C. A., 9th), 4 F. (2d) 534; and *The Underwriter* (C. C. A., 2nd), 13 F. (2d) 433, 434. In the *Story* case, heretofore cited in another connection, it was said:

> The regularity of the seizure is not a necessary condition to a condemnation of the things seized, providing there is sufficient ground for an adjudication of a forfeiture. Property may be seized by a pri-

> vate person, acting at his peril, and, if a cause of forfeiture is shown to exist against it, condemnation will follow, notwithstanding the seizure was by an unauthorized person. *The Caledonian*, 4 Wheat. 101; *Wood* v. *U. S.*, 16 Pet. 342; *Taylor* v. *U. S.*, 3 How. 197.

In *The Sagatind*, where one of the counts of the libel for forfeiture was based upon Section 26, Title II, of the National Prohibition Act, District Judge Augustus Hand observed:

> I do not regard the seizure by the Commissioner, or some one acting under his authority, as mandatory. Any seizure is sufficient, if a ground of forfeiture existed to give the court jurisdiction.

And in the case of *The Underwriter* the Circuit Court of Appeals for the Second Circuit declared:

> The learned District Judge was in error in holding that the seizure must be lawful in its origin. The particular method used in bringing the vessel into the District of Connecticut was of no importance in so far as the jurisdiction is concerned. As it appears that the res was in the possession of the collector when the libel was filed, it is sufficient to support the jurisdiction of the libel. *The Caledonian*, 17 U. S. (4 Wheat.) 100; *Taylor* v. *United States*, 44 U. S. (3 How.) 197; *Wood* v. *United States*, 41 U. S. (16 Pet.) 342; *United States* v. *One Studebaker Sedan* (C. C. A.), 4 F. (2d) 534; *United States* v. *Story* (C. C. A.), 294 F. 517.

The cases here cited unmistakably establish that the jurisdiction of the District Court in the instant case to adjudge a forfeiture of the seized motor boat was in no way impaired by the unauthorized seizure of the boat by the police officers, even though it be assumed, for the sake of the argument, that the adoption of the seizure by the Government did not render it lawful as originally made. As the property sought to be condemned was in the custody of the court upon proper judicial process executed by the United States Marshal by taking over the property from the Federal Prohibition Director, the only matter which the court was called upon to determine upon the motion to dismiss was whether the libel alleged a sufficient ground for forfeiture. The libel prayed the forfeiture of the motor boat under and by virtue of the provisions of Section 26, Title II, of the National Prohibition Act. (R. 4.) In the next and final point of this brief, the Government proposes to show that the facts alleged in the libel were sufficient to justify the court in decreeing a forfeiture of the seized property, and that the Circuit Court of Appeals therefore correctly overruled the action of the District Court in dismissing the libel.

IV

The libel alleged a sufficient ground for forfeiture under section 26

The libel, which was filed March 5, 1925, alleged in substance that on April 18, 1924, police officers

of the city of Providence discovered one Dodge in the act of transporting, within the jurisdiction of the court, a large quantity of intoxicating liquor in violation of Sections 3 and 26 of Title II of the National Prohibition Act in the motor boat here in question; that said police officers seized the liquor and the motor boat and also arrested Dodge, who was in charge of the boat; that Dodge was subsequently arrested by United States officers and on December 10, 1924, was convicted in the Federal District Court of the offense of transporting said liquor in violation of Section 3, and that the motor boat was delivered to the Federal Prohibition Director, who held it in custody within the jurisdiction of the court. Petitioners assert that these facts do not show a sufficient ground for forfeiture under Section 26, because, before a forfeiture provided for by statute can be adjudged, it must appear that the statutory requirements were strictly complied with, and the facts alleged in the libel in this case show that the procedure prescribed by Section 26 was not followed.

Stated in the order in which they appear in Section 26, the requirements of that section which precede the direction to the court to order a sale of the seized property are as follows: (1) That an officer of the law discover a person in the act of transporting intoxicating liquor in violation of the law; (2) that such officer seize the liquor thus transported; (3) that he take possession of the vehicle; (4) that he arrest the person in charge of the

vehicle; (5) that he proceed at once under Title II in a court of competent jurisdiction against the person arrested; (6) that the vehicle be released upon a prescribed bond approved by such officer; (7) that the person arrested be convicted; (8) that the court order the liquor destroyed; and (9) that the owner fail to show good cause why the court should not order the seized property sold. To hold that each of these requirements must be complied with to give the court jurisdiction to order the vehicle sold, would render it impossible for the Government to obtain such a forfeiture in many cases where it had ample evidence that the vehicle had been used in transporting intoxicating liquor in violation of the Act. It would, for example, cut off the Government's right to have such a forfeiture adjudged wherever the discovering officer had died or had left the service and could not be found so that he could not be procured to proceed against the offender; or where such officer had overlooked seizing the liquor, or the liquor had been seized, or the vehicle taken into possession, or the person in charge arrested, by some other officer who had appeared on the scene of the violation too late to discover the actual illegal transportation. It would, moreover, deprive the court of power to order a sale of the vehicle, notwithstanding the conviction of the person in charge and the failure of the owner to "show good cause," unless the court had previously ordered the liquor destroyed.

Furthermore, if a strict compliance with the provisions of Section 26 were essential to authorize the court to adjudge such a forfeiture, then the libel filed in the instant case would have to be dismissed, even though every requirement above enumerated had been fulfilled, for the forfeiture provision of that section does not in terms authorize the filing of a libel for forfeiture, but merely directs the court to order a sale of the seized property, following a conviction of the person arrested and a failure of the owner of the property to show good cause why such order should not issue. Yet the practice of filing such libels, subsequent to the conviction of the person in charge of the vehicle and independently of the criminal action, has been generally followed and has received the approval of the lower Federal courts as essential to enable them to determine the equities of innocent owners and lienors, for the protection of whom the statute provides.

The mere recital of the foregoing results which would follow the construction contended for by petitioners evidences beyond question that Congress did not intend, when enacting Section 26, to make the jurisdiction of the court to adjudge a forfeiture of the vehicle depend upon a strict compliance with each and every provision of the statute.

The Government does not mean to assert that none of the provisions of Section 26 are jurisdictional. The requirement that the person arrested must be convicted before a forfeiture of the seized

property can be adjudged was obviously based upon the decision of this Court in the case of *Coffey* v. *United States*, 116 U. S. 436, 443–445, that if a person is acquitted of the charge of violating a law for the violation of which property found in his possession is declared by statute to be forfeitable, a libel to forfeit the property will not thereafter lie. The intent of Congress is also clear that a vehicle seized under Section 26 should not be subject to forfeiture if the owner satisfy the court that he was not responsible for the illegal use to which the vehicle had been put. The remaining requirements, however, are obviously mere directory provisions imposing upon the officer who discovers the violation certain duties a failure to perform which could not have been designed to prevent a forfeiture of the vehicle. That these requirements of Section 26 do not exclude the United States from all other remedies in such cases was held in the case of *United States* v. *Story*, 294 Fed. 517, wherein the Circuit Court of Appeals for the Fifth Circuit remarked (p. 519):

> The further contention is made that the remedy provided by section 26 is exclusive, and that, for that reason, the libel was properly dismissed. The remedy created in Section 26 applies by its terms only when a person is discovered in the act of transporting liquor in violation of the law, and is then and there arrested by the officer, and his vehicle and liquor seized, and he convicted, after being taken by the officer before a court

of competent jurisdiction. If this is the only remedy available to the government, in instances where the person in charge of the offending vehicles escape before arrest or absconds or dies after arrest, no condemnation of the vehicle would be possible, and a large number of cases would go unprovided for. Section 26 provides for the intervention of those having liens on the vehicle, not only upon the hearing in the criminal cause, but "in other proceeding brought for said purposes." The aim of section 26 was to provide a summary method of disposing of vehicles, in the cause in which the guilt of the owner was established by conviction, and in cases where that was possible. It can not embrace all cases and is therefore cumulative, not exclusive. *U. S.* v. *One Stephens Automobile* (D. C.), 272 Fed. 188.

Nor is the government required to adopt the summary method with respect to the vehicle seized, because the liquor seized with it was ordered destroyed in the criminal cause, any more than because the person arrested at the time of the seizure was convicted in the criminal cause. Destruction of the liquor and forefeiture of the vehicle are two rights of different nature and purpose, and the fact that they are both permitted to be pursued in the criminal cause, upon conviction of the person arrested, does not require that this be done. The destruction of the seized liquor is an incident to the conviction of the person arrested, and follows as a matter of course. Condemnation of the

> vehicle may depend upon questions of ownership and lien that require a hearing for the benefit of claimants.

And in *The G–883*, 6 F. (2d) 416, where it was contended that a motor boat could not be forfeited under Section 26 because the seizing officers had refused to release it under bond, the District Court for Rhode Island said:

> This boat was undoubtedly engaged in the illegal transportation of liquor under the National Prohibition Act. The only reason argued why she should not be forfeited therefor is that, after this cause of forfeiture was alleged, the government officers refused to release her on bond, as required by the Prohibition Act. It is contended that this refusal in effect estops the government from insisting on this charge. There is no provision in the statute which gives the refusal such effect, and no decision has been called to my attention supporting this contention.

Aside from their contention as to the effect of a seizure by police officers, petitioners do not clearly specify the particular requirements of Section 26, the failure to comply with which they assert deprived the District Court of jurisdiction to adjudge a forfeiture of the boat and accordingly justified that court in dismissing the Government's libel. It may be gathered from their brief, however, that the claim of lack of jurisdiction is based upon the grounds that the Federal officers were without right to take over the motor boat from the police

officers, because the boat at that time had no liquor on board and was not being used in transporting intoxicating liquor in violation of the National Prohibition Act, and because the Federal officers had not seized the liquor which had been transported on the boat; and that the Federal officers were also without right to arrest and proceed against the person in charge of the boat because those officers were not the ones who discovered the defendants in the act of illegally transporting intoxicating liquors in said boat. For the reasons above given, however, the Government urges that the requirements of Section 26 thus relied upon by petitioners are directory only and have no bearing upon the jurisdiction of the court to adjudge the forfeiture of a vehicle found transporting intoxicating liquor in violation of the National Prohibition Act.

CONCLUSION

It is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

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